

OPINION NUMBER 95-2

DATE: February 6, 1995

SUBJECT: Limitations on Councilmember Participation in
Environmental Document Process

REQUESTED BY: Councilmember Valerie Stallings

PREPARED BY: Leslie J. Girard, Chief Deputy City Attorney

QUESTIONS PRESENTED

You have requested an opinion concerning any specific prohibition or limitation on a councilmember 1) requesting the City Manager to prepare a full Environmental Impact Report, or 2) commenting on a draft Negative Declaration before it is docketed for the City Council agenda.

SHORT ANSWERS

As is more fully set forth below, a City councilmember is prohibited from interfering with the independent authority of the Development and Environmental Planning Division ("Division") of the Development Services Department ("Department") which, pursuant to the recent reorganization of certain City departments, is charged with the independent authority to initially decide the means by which the City complies with the California Environmental Quality Act ("CEQA"). That prohibition extends both to a request to the City Manager to prepare a full Environmental Impact Report ("EIR") for a given project and to comment upon any environmental document prior to consideration of that document by the full Council. In addition, due process concerns require that a councilmember not request a particular type of environmental document and not comment upon any environmental document prior to its consideration by the City Council. Once the matter is before the full City Council for consideration, however, a Councilmember is free to question, criticize or otherwise comment upon its sufficiency.

ANALYSIS

The general provisions governing the preparation of environmental documents are set forth in CEQA (Public Resources Code section 21000 et seq.) and the guidelines thereto ("Guidelines") (California Code of Regulations, Title 14, section 15000 et seq.). Neither CEQA nor the Guidelines set forth any prohibition or limitation on the ability of a councilmember to participate in the EIR process. However, certain prohibitions and limitations are set forth in the City's Charter and Municipal Code, and are established by case law. These prohibitions and

limitations were discussed in great detail in a previous Report to the Mayor and City Council ("Report"), dated June 15, 1990. A copy of that Report is attached.

Generally, Charter section 28 provides that the City Manager shall be responsible for the administration of the City, which responsibility includes ensuring compliance with State laws (such as CEQA). Charter section 22 requires that, except for purposes of inquiry, councilmembers shall deal with managerial departments through the City Manager or a designated representative.

Furthermore, Municipal Code section 22.2401(e) specifically provides that the Division:

shall maintain that degree of independence in the performance of its functions and duties as will assure the City Manager, the City Council, Planning Commission and the people of the City of San Diego that its review and analysis of the environmental consequences of projects under its purview, whether beneficial or detrimental, are independent and wholly objective and are not prepared for the purpose of either supporting or detracting from any project, plan or position, whether advanced by the City, any other governmental agency, a developer, a citizen or a group of citizens.

That charge is also set forth in Municipal Code section 69.0204, included in Chapter VI, Article 9, which sets forth the specifics concerning the preparation of environmental documents. Generally, Article 9 (at Municipal Code sections 69.0201-69.0218) requires the Division to independently determine the appropriate environmental document for a given project. Given the mandated independence of the Division in this area, and the prohibition on Council interference with managerial matters, it would be inappropriate for a councilmember to interfere, or even attempt to interfere, with the decisionmaking process. See also Report at pp. 24-25. A Councilmember should thus not attempt to influence the process by requesting a particular type of environmental document.

Also, interference should not be manifested in other ways, such as commenting upon a draft environmental document before its consideration by the full Council. The relevant analysis is set forth in detail in the attached Report, in particular in Hypothetical Nos. 2 and 5. See Report at pp. 4-5, 27-30, and 31-32. In sum, comments might, even though made with no ulterior motive, influence the preparation of the document and thus interfere with the independence of the Division.

Along with Charter limitations, due process principles compel a

conclusion that a Councilmember may not request a particular type of environmental document or comment on any type of environmental document before it is docketed before the full Council.

These due process concerns are more fully set forth in the attached Report. In general, if the matter is of an administrative or quasi-judicial nature^F

For example, subdivision maps, variances, conditional use permits, and the consideration of other types of use permits and agreements. See Report at pp. 14-15.

a councilmember may not become involved in the CEQA process prior to consideration by the full Council. The attached Report sets forth in detail the reasons for this prohibition, which include both substantive and procedural due process concerns. See Report at pp. 15-24, 27-29, 31. The prohibition arises because of fairness concerns toward the parties involved in the proceeding and the requirement for an impartial decisionmaker. Suffice it to say that a request to prepare a particular environmental document, or the making of pre-consideration comments, certainly remove the aura of impartiality that should surround an administrative or quasi-judicial determination.

How due process concerns affect proceedings of a legislative nature,^F

For example, adoption or amendment of general plans, zoning or rezoning of property, and location of public improvements or facilities. See Report at pp. 8-10, 12-13.

however, are not so easily answered. Due process principles attach to legislative proceedings (See Report at pp. 8-10) but they are more attenuated than those that attach to administrative or quasi-judicial proceedings. Even so, when considered with the prohibitions contained in the Charter and Municipal Code (discussed above) the conclusion remains the same - a councilmember may not request a particular type of environmental document or comment upon any such document prior to its consideration by the full Council.

CONCLUSION

The San Diego City Charter and Municipal Code draw clear lines of authority concerning the preparation of environmental documents. Both the Charter and Municipal Code make clear that a councilmember may not request the preparation of a particular type of environmental document or comment upon such document prior to its consideration by the full Council. Due process concerns reinforce that prohibition.

Respectfully submitted,
JOHN W. WITT, City Attorney
By
Leslie J. Girard

Chief Deputy City Attorney

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Attachments

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APPROVED:

JOHN W. WITT

City Attorney